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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR
Appellant

-v-

STATE OF LOUISIANA
Appellee

Appeal from the Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

I.

LOUISIANA'S GENERAL EXEMPTION FROM JURY SERVICE GRANTED TO WOMEN BY ARTICLE 7, SECTION 41, OF THE CONSTITUTION OF THE STATE OF LOUISIANA AND ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Article 7, Section 41, of the Louisiana Constitution provides as follows:

> "The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases, provided however, that no woman shall be drawn for jury service unless she shall have previously filed with the Clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which punishment may be by hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict, cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

Article 402 of the Code of Criminal Procedure further provides:

> "A woman shall not be selected for jury service unless she has previously filed with the Clerk of Court of the Parish in which she resides a written declaration of her desire to be subject to jury service."

Neither the Louisiana Constitution nor the Code of Criminal Procedure purports to exclude women from jury service, but rather accords them the privilege to serve without imposing the duty to do so. Women may waive this exemption by simply filing with the Clerk

of the Parish in which they reside a written declaration of their desire to serve.

Appellant does not contend any discriminatory practices by any jury commissioners or state officials.

The Louisiana Supreme Court, in its decision below (App. p. 16-17), held as it consistently has held that Louisiana exemption for women is neither irrational nor discriminatory. In *State v. Edwards*, 287 So: 2d 518 (1973), the Louisiana Supreme Court stated:

> "[1, 2] Women were *not excluded* from jury service by the jury commissioners or by law. The effect of our law is to permit them to serve if they volunteer for service; they cannot be compelled to serve otherwise. La. Const. art. VII, Paragraph 41; La. Code Crim. Proc. art. 402. This Court has consistently held that Louisiana's constitutional and statutory provisions, requiring women to file with the clerk of court of the parish in which they reside a written declaration of their desire to be subject to jury service before they can be selected, impair no federal constitutional right. *State v. Womack*, 283 So. 2d 708 (La. 1973); *State v. Taylor*, 282 So. 2d 491 (La. 1973); *State v. Roberts*, 278 So. 2d 56 (La. 1973); *State v. Enloe*, 276 So. 2d 283 (La. 1973); *State v. Washington*, 272 So. 2d 355 (La. 1973); *State v. Daniels*, 262 La. 475, 263 So. 2d 859 (1972); *State v. Curry*, 262 La. 280, 263 So. 2d 36 (1972); *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971); *State v. Millsap*, 258 La. 883, 248 So. 2d 324 (1971); *State*

v. Sinclair, 258 La. 84, 245 So. 2d 365 (1971); *State v. Pratt*, 255 La. 919, 233 So. 2d 883 (1970); *State v. Comeaux*, 252 La. 481, 211 So. 2d 620 (1968); *State v. Dees*, 252 La. 434, 211 So. 2d 318 (1968); *State v. Reese*, 250 La. 151, 194 So. 2d 729 (1967); *State v. Clifton*, 247 La. 495, 172 So. 2d 657 (1965). (Emphasis added.)

In its decisions upholding the constitutional and codal provisions granting women a general exemption from jury service, the Louisiana Supreme Court has followed the authority of this court in *Hoyt v. State of Florida*, 368 U. S. 57, 82 S. Ct. 159 (1961). The court in that case dealt with a Florida statute which was almost identical to the Louisiana provisions in the case at bar.

> "The jury law primarily in question is Fla. Stat., 159, § 40:01 (1), F.S.A. This Act, which requires that grand and petit jurors be taken from 'male and female' citizens of the State possessed of certain qualifications, contains the following proviso:
>
> > 'provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.'
>
> Showing that since the enactment of the statute only a minimal number of women has so registered, appellant challenges the constitutionality of the statute both on its face and as applied

> in this case. For reasons now to follow, we decide that both contentions must be rejected."

In upholding the constitutionality of the Florida statute, this court said:

> "Manifestly, Florida's § 40.01(1) does not purport to exclude women from state jury service. Rather the statute 'gives to women the privilege to serve, but does not impose service as a duty.'"

Appellant's main contentions are that after the decisions of this court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Peters v. Kiff*, 407 U.S. 493 (1972), due process of law requires that a state jury be selected from a representative cross-section of the community, and the general exemption granted to women by Louisiana law has denied him his Sixth Amendment right to trial by a fair and impartial jury as applied to the states by the Due Process Clause of the Fourteenth Amendment and that at some point in time between the *Hoyt* decision in 1961 and appellant's conviction in 1972, the "sands of time have shifted beneath its foundations" and a state may no longer grant an exemption to women for jury service.

The State of Louisiana contends that the Sixth Amendment right to trial by jury as applied to the states by the Due Process Clause of the Fourteenth Amendment does not apply the standards and policies of the federal courts of jury venire make-up and exemtions to the states.

In *Duncan v. Louisiana*, supra, this court applied the Sixth Amendment right to trial by jury to the

states; however, subsequent decisions have shown that the guarantee to a jury trial does not include every vestige of the federal concept of jury trial. In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970), this court held that the twelve-man requirement is not an indispensable component of the Sixth Amendment jury trial as applied through the Fourteenth Amendment to the states. In *Apodaca v. Oregon*, 406 U.S. 399, 92 S. Ct. 1628 (1972), the court held that State court convictions by less than unanimous juries do not violate right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment.

The issue presented in the case at bar is the validity of an exemption granted to women of a state by that state on the basis of the state interest in the general welfare of its citizens and women as the center of home and family life. It is not a case of jury commissioners systematically excluding persons because of race or any other discriminatory reason from the jury roles. It is a case of a state exercising its right to grant exemptions from jury service for the good of the community based on its awareness and concern with the social and cultural structure of its citizenry.

Appellant cites absolutely no authority for the proposition that a state may not grant such an exemption nor one case in which an exemption granted to citizens of a state has been held to violate the Sixth Amendment right to jury trial through the cross-section of the community requirement of the Due Process Clause of the Fourteenth Amendment.

In his argument, appellant places great emphasis on the decision of this court in *Ballard v. United States*, 329 U.S. 187 (1946). This case involved the systematic and intentional exclusion of women from a Federal District Court jury panel. It did not involve an exemption granted to women. In fact, the court specifically pointed out that there was no exemption provided for women by either Congress or the state in which the district court sat. The holding of the case rested on the fact that the district court had not followed the scheme of jury selection that Congress had adopted. Reversal was based on this court's supervision over the administration of justice in federal courts and no mention at all was made of any constitutional issue being presented. At page 193 the court concluded:

> "We conclude that the purposeful and *systematic exclusion* of women from the panel in this case was a departure from the scheme of *jury selection* which *Congress* adopted and that, as in the *Thiel* case, we should exercise our *power of supervision over the administration of justice in the federal courts, McNabb v. United States*, supra, to correct an error which permeated this proceeding." (Emphasis added.)

The other authorities appellant cites, *Smith v. Texas*, 311 U.S. 128 (1941), *Carter v. Jury Commission*, 396 U.S. 320 (1970) and *Peters v. Kiff*, supra, (1972), all dealt with racial discrimination.

In *Smith v. Texas*, supra, Justice Black, speaking for the court at P. 130, overturned convictions based on racial discriminations by state officials in violation

of the constitution and laws enacted under it, referring by footnote 4 to 18 Stat. 336, 8 U.S.C. § 44, the federal statute prohibiting racial discrimination in jury selections. The case did not hold that a proportional segment of each class of a community must be present on jury panels. The case dealt with exclusion by invidious discrimination, not with an exemption granted to a particular class on a rational and historic basis.

In *Carter v. Jury Commission*, supra, at 523, 524, this court dealt with racial discrimination by jury commissioners and pointed out the injurious brand placed on Negroes by their exclusion, which contravenes the long-standing constitutional and statutory prohibition against racial bias in selecting juries.

In *Peters v. Kiff*, supra, although a white challenged his conviction on the basis of Negroes being excluded from the jury roles, the case still dealt with the long-standing concern through the constitution and acts of Congress with the systematic exclusion of blacks by state officials. This constituted an illegally-drawn jury by reason of Congressional Act, 18 U.S.C. § 243. The court did not say that a defendant was entitled to a proportional cross-section of the community, but in dicta said, referring to *Williams v. Florida*, supra, that a fair possibility for obtaining a cross section of the community should be present. *Williams*, supra, spoke of *arbitrary exclusion* of a particular class being forbidden.

All of these cases dealt with the problem of racial discrimination by officials in selecting jury roles and none dealt with exemptions granted to women by a state for their benefit.

Additionally, no specific holding was made in these cases requiring a jury panel reflective of a cross-section of the community. What was mentioned was a fair possibility of a jury panel reflective of a cross-section of the community free of *arbitrary* exclusion.

In the case at bar, a cross-section of the community is available for jury duty. Women, as a class, are not prohibited from service. If they choose to serve, they may. There is no allegation nor any evidence presented that jury commissioners or state officials systematically exclude women from the roles once they choose to serve.

The right of a state to exempt certain classes from jury service is of long standing. In *Rawlins v. Georgia*, 201 U.S. 638 (1906), Justice Holmes stated at 640:

> "But if the state law itself should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains, in short substantially the exemption complained of, is of old standing and not uncommon in the United States. It could not be denied that the State properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case."

See also *Zelechower v. Younger*, 424 F. 2d 1256, 1259 (9th Cir. 1970).

The right of exemptions for women from jury service is of long standing in both state and federal courts. *Hoyt v. Florida*, supra, at 60.

Considering the above, the State of Louisiana contends that after *Duncan v. Louisiana*, supra, the state is still free to determine its own policy of exemptions, even if they do not coincide with those of the federal courts, if it meets the test stated in *Hoyt v. Florida*, supra, at 61:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."

And as this court decided in *Hoyt*, an exemption for women would meet this test. As Justice Harlan pointed out at page 61, 62, :

> "In neither respect can we conclude that Florida's statute is not 'based on some reasonable classification,' and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. *We cannot say that it is constitutionally impermissible for a State*, acting in pursuit of the

> *general welfare*, to conclude that a woman should be relieved from the civic duty of jury service *unless she herself determines* that such service is consistent with her own special responsibilities.
>
> ◆ ◆ ◆
>
> It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities. But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasable to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption." (Emphasis added.)

Appellant alleges that since *Hoyt* the court has charged its standard for examination of laws that discriminate solely on the basis of sex. The cases that appellant relies on as examples of this court's changed attitude are *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 532 (1973). The court, in both cases, recognized that the questionable statutes were based on speed and efficiency in handling of administrative functions. This court recognized that administrative convenience, while not completely lacking in importance, is subordinate to high priorities such as where there is a statutory scheme that draws a sharp line between the sexes.

But the Louisiana provisions complained of do

not rest their origin in mere matters of administrative convenience. Instead, Louisiana is attempting only to regulate and provide stabliity to the state's own idea of family life.

The Idaho provision in *Reed v. Reed*, supra, was a mandatory statute that gave men preference over women in administration of an estate. The probate court in Idaho recognized the equality of applicants for the position without any determination of relative capabilities in performance of the functions incident to an administration of an estate. The presumption was conclusive in *Reed* that the father of the deceased was more suitable than the mother to administer the estate. *Reed* did not deal with whether sex is a suspect classification. But such a contention was brought out in *Frontiero v. Richardson*, which dealt with a female married Air Force officer challenging a federal statute that required proof of her husband's dependency before she could receive increased quarters allowances and housing and medical benefits for her husband. No such proof of dependency was required by a male service member seeking the same allowances with respect to his wife. There were four dissenting justices in *Frontiero* at p. 1773, three of who expressly rejected "that classifications based upon sex, 'like classifications based upon race, alienage, and national origin', are 'inherently suspect and must therefore be subjected to close judicial scrutiny." The dissent pointed out that *Reed* had drawn no such conclusion of sex as an inherently suspect classification.

In the two above mentioned cases there was a purely arbitrary preference in favor of males. The

preference given to women in Louisiana has its history in the unique treatment Louisiana has afforded the family unit without concern for administrative speed or efficiency. Louisiana submits that the exemption given to women by the Louisiana legislature is reasonable and has a rational connection between the preference given to women and the legitimate government end in which Louisiana seeks to protect its family life.

This court has before recognized Louisiana's special interest in protection of family life in *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971). In *Labine*, this court upheld choices reflected in Louisiana intestate succession that denied acknowledged illegitimate children from claiming rights of legitimate children and permitting acknowledged illegitimates to inherit only to the exclusion of the states as within the power of the state to make. The court concluded at p. 1021 that "the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." Louisiana is exercising its rule-making powers "to establish, protect and strengthen family life" and whether the court thinks Louisiana's rules are wisely enacted does not bear on the constitutionality of the enactments.

The State of Louisiana has a long tradition of protection of the family founded in its civil law traditions and customs rooted in its historical French and Spanish heritage. See *Labine v. Vincent*, supra.

With this background and tradition of concern for family life and the women at the center of the family, the State of Louisiana has long granted this general exemption to its women from jury service. Because of the state's closeness to its people and awareness of their needs, this court has long left such social and policy questions to the states.

In *Fay v. New York*, 322 U. S. 261 (1947), this court noted at 240:

> "It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible, but women jury service has not so become a part of the testual or customary law of the land that one convicted of crime must be set free by this court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.

In this regard, states often vary in their innova-

tions or lack of it in developing their systems of criminal justice. With this in mind, this court stated in *Fay*, supra, at 295:

> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see *People v. Dunn*, 157 N.Y. 528, 52 N.E. 572, 43 L.R.A. 247, and it is still undergoing revision and adaptation to adjust to the tensions of time and locality."

The Federal District Court followed this principle recently in upholding the State of New York's exemption for women from jury service in *Leighton v. Goodman*, 311 F.Supp 1181, 1183 (1970).

Appellant quotes many statistics relating to women in his argument (p. 9-10), yet these would be better presented to the state legislature or Congress than to this court, for statistics cannot reveal the social and traditional concerns of the Louisiana population.

The State of Louisiana is not unresponsive to change or "the sands of time" and, in fact, in April of 1974, voted to enact a new constitution to take effect January 1, 1975, which does not retain an exemption for women as in Section 41 of Article VII of the present constitution. The new Constitution's provision respecting jurors, Article V, Section 33, will read as follows:

"Section 33. (A) Qualifications.

A citizen of the State who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. The legislature may provide additional qualifications.

(B) Exemptions.

The Supreme Court shall provide by rule for exemption of jurors."

The fair import of the new Constitution would also do away with the Code of Criminal Procedure Article 402, as all exemptions will be determined by Supreme Court rule.

To contend that this conviction should be reversed because Louisiana's general exemption has been smothered by the sands of time would ignore the State of Louisiana's concern with, and development of, its system of criminal justice. It has indeed responded to change as it felt its system of justice and citizens required, though perhaps, on this issue, slower than some states. Yet, who can say at what point in time between this court's decision in *Hoyt v. Florida*, supra, in 1961, and appellant's conviction in 1972, it became too late to meet constitutional requirements of due process?

Considering the above arguments, the State of Louisiana contends that its general exemption of women from jury contained in its present Constitution and Code of Criminal Procedure is reasonable and not discriminatory nor violative of the right to a fair and impartial jury as applied to the states by the Due Process Clause of the Fourteenth Amendment. As to this issue, the number of women who have served on juries in the state is irrelevant, as stated by the court in *Hoyt v. Florida*, supra, at 65:

> "This argument, however, is surely beside the point. Given the reasonableness of the classification involved in § 40.1 (1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. 'Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period.' *Hernandez v. Texas*, supra, at 482."

II.

APPELLANT, A MALE, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE GENERAL EXEMPTION GRANTED TO WOMEN FROM JURY SERVICE BY LOUISIANA LAW, AS HE IS NOT A MEMBER OF THE ALLEGEDLY EXCLUDED CLASS, NOR SHOULD HIS CONVICTION BE SET ASIDE WITHOUT A SHOWING ON HIS PART OF SOME POSSIBILITY OF HARM OR PREJUDICE.

Appellant, who urges no prejudice or bias by the all-male jury which convicted him, would have the court reverse an unquestionably fair and impartial trial on the basis that not enough members of a class of which he is not a member, were not included in the jury selection process. He makes no allegations that,

had women been included, his trial would have been any more fair or impartial, nor that their absence caused him any harm.

The State of Louisiana has urged this court to uphold its constitutional and codal exemptions. In either case the State contends that petitioner, a male, has no standing to challenge this jury panel or have his conviction set aside on the basis that there were not enough women on the jury roles. To allow reversals of obviously fair and unbiasd convictions on the basis that an exemption granted by the state to some class, of which petitioner is not a member, without even a hint of prejudice opens the door for any convicted defendant to "shop" around the community for any identifiable group who, for any reason, might not be compelled to serve on juries — in effect, to escape conviction on a technicality without the slightest consideration of whether he has suffered any harm.

Appellant relies on *Peters v. Kiff*, supra, and *Ballard v. United States* for this contention. However, there is a great distinction between these cases and the rationale behind them and the case at bar. Both cases involved illegal discrimination by officials charged with jury selection. In his brief, appellant, at page 7, quotes selectively from *Ballard* but perhaps the entire quote is more revealing of the issue under consideration.

> "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. *The*

> *systematic and intentional exclusion* of women, like the exclusion of a racial group, *Smith v. Texas*, 311 U.S. 128, or an economic or social class, *Thiel v. Southern Pacific Co.*, supra, deprives the jury system of the broad base it was *designed by Congress* to have in our democratic society. *It is a departure from the statutory scheme.* As well stated *in United States v. Roemig*, 52 F. Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of jury personnel.' It 'does not accord to the defendant the type of jury to which the law entitles him. *It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.* Cf. *Kotteakos v. United States*, 328 U.S. 750, 764-765. The injury is not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (Emphasis added.)

What the court was concerned with in its reversal was the Federal District Court's intentional exclusion of women in violation of the statutory system of jury selection set out by congress. In addition there was a woman involved as a defendant in the trial and a possibility of prejudice. See *Ballard*, supra, at 194, 195. Additionally, as pointed out above, *Ballard* was reversed pursuant to this court's supervisory powers over the administration of criminal justice in federal courts.

In *Peters v. Kiff*, supra, in which this court al-

lowed a white man to challenge the constitutionality of his jury selection because of racial discrimination against Negroes, the court was again faced with an illegal jury selecting process. The decision by a divided court rested on the long concern for preventing racial discrimination and the illegality of such discrimination in jury trials. The holding as announced by Justice Marshall for three members of this court stated:

> "Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service. *For Congress has made such an exclusion a crime.* 18 U.S.C. § 243." (Emphasis added.) *Peters v. Kiff*, supra, at 2169.

In the concurring opinion of Justice White, this central theme was even stronger:

> "For me, however, the rationale and operative language of *Hill v. Texas* suggest a broader sweep; *and I would implement the strong statutory policy of* § 243, *which reflects the central concern of the Fourteenth Amendment with racial discrimination*, by permitting the petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him" (Emphasis added.) *Peters v. Kiff*, supra, at 2170.

However, in the case at bar, there are no allegations that the State or its officials have attempted to exclude women. The absence of women itself does not carry the same effect as the absence of racial groups and the resulting possibilities of invidious discrimination affecting the criminal jury system. The observaton of this court in *Hoyt v. Florida*, supra, recognized this at page 68.

> "This case in no way resembles those involving race or color in which the circumstances shown were found by this court to compel a conclusion of purposeful discriminatory exclusions from jury service. E.g. *Hernandez v. Texas*, supra, *Norris v. Alabama*, 294 U.S. 587; *Smith v. Texas*, 311 U.S. 128; *Hill v. Texas*, 316 U.S. 400; *Eubanks v. Louisiana*, 356 U.S. 584. There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in these cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evidenced."

Given the situation in the case at bar, where there is no illegal action on the part of the State in its jury selection process, where we are dealing not with a prohibition against a class, but with an exemption, and not with racial discrimination, the State of Louisiana contends that appellant, who is not a member of the alleged absent class, must show some possibility of harm or prejudice to himself in order to have his conviction reversed.

It is true that after *Duncan v. Louisiana*, supra, a defendant does have a right to a fair and impartial jury trial guaranteed by the Sixth Amendment and applied to the State through the Fourteenth Amendment. Also, this court has recently spoken of the need for a fair possibility for representation from a cross-section of the community. Yet, this court has never ruled that a defendant has a right to any particular class on his jury. The principle that jury panels should reflect a cross-section of the community is more a creature of the due process clause than the Sixth Amendment. See *Apodaca v. Oregon*, supra, at 1634 and *Peters v. Kiff*. The principle has developed through the possibility that certain members of a class may suffer from the prejudices likely where discrimination occurs against the class and is especially rooted in the historical struggle against racial discrimination.

The State of Louisiana maintains that it is still necessary for defendant to show that the absence or exclusion of a class which depletes the cross-section of the jury panel has some relationship to possible bias or prejudice in the accused trial, except where the jury panel is challenged as being illegally constituted by purposeful racial discrimination as in *Peters v. Kiff*, supra. In other cases involving classes and groups of communities, a defendant should still be required to show some harm or prejudice and the words of Chief Justice Burger in his dissent in *Peters v. Kiff*, supra, at 2171 should still apply:

> "However, in order for petitioner's conviction to be set aside, it is not enough to show merely that there has been some unconstitutional or unlawful action at the trial level. *It must be established that petitioners's conviction has resulted from the denial of federally secured rights properly asserted by him.* See *Alderman v. United States*, 394 U.S. 165, 171-174, 89 S.Ct. 961, 965-957, 22 L.Ed.2d 176 (1969); *cf. Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L.Ed.2d 697 (1960)." (Emphasis added.)

The State of Louisiana urges that the appellant's conviction not be reversed.

III.

THE STATE OF LOUISIANA REQUESTS THIS COURT, SHOULD IT RULE AGAINST THE STATE, TO NOT APPLY ITS RULING RETROACTIVELY BECAUSE OF THE TREMENDOUS HARDSHIP IT WOULD PLACE ON THE CRIMINAL JUSTICE SYSTEM IN THE STATE.

CONCLUSION

The constitutionality of Article VII, § 41 of the Louisiana State Constitution and Article 402 of the Louisiana Code of Criminal Procedure should be upheld and the conviction of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter Smith, Assistant Attorney General for the State of Louisiana, counsel for appellee herein, depose and say that on the 8th day of July 1974, I served a copy of the foregoing brief on counsel of record for the defendant, Billy J. Taylor, appellant herein, by mailing same herin to his post office box, P. O. Box 1029, Covington, Louisiana 70433.

All parties required to be served have been served.

.....
WALTER SMITH

Sworn to and subscribed
before me this 8th day
of July, 1974

.....
JULIAN J. RODRIGUE
NOTARY PUBLIC